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# Legal Education: Rethinking the Problem, Reimagining the Reforms

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# Legal Education: Rethinking the Problem, Reimagining the Reforms

Deborah L. Rhode\*

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## I. INTRODUCTION

“American legal education is in crisis,” announced the *New York Times* in a 2011 editorial.<sup>1</sup> The same view has been emerging from a chorus of other commentators.<sup>2</sup> In answer to the title of a *National Law Journal* roundtable discussion, *Is Legal Education in Crisis?*, Brian Tamanaha offered a widely shared assessment: “Law schools are not in crisis. The real crisis is suffered by our recent graduates . . . .”<sup>3</sup> As the *Times* noted, “crushing student loans and bleak job prospects” have left many new lawyers in desperate straits.<sup>4</sup> While “crisis” may not be the most appropriate term to describe it, law schools are operating in a difficult climate,

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\* Ernest W. McFarland Professor of Law, Director of the Center on the Legal Profession, and Director of the Program on Social Entrepreneurship, Stanford University. This article is part of *Pepperdine Law Review*’s April 20, 2012 *The Lawyer of the Future* symposium, exploring the role of the lawyer in American society—past, present, and future.

1. *Legal Education Reform*, N.Y. TIMES, Nov. 25, 2011, <http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html>.

2. For an overview, see BRIAN TAMAHANA, *FAILING LAW SCHOOLS* (2012). For examples, see sources cited in Eli Wald & Russell G. Pearce: *Denial and Accountability in Legal Education: How Law Schools Fail to Meet Their Responsibility for the Formation of Professional Identity*, 24 ST. THOMAS L. REV. (forthcoming 2012).

3. Karen Sloan, *Educators Debate: Are Law Schools in Crisis?*, NAT’L L.J., Nov. 7, 2011, LEXIS 1202524763160 (comments of Brian Tamanaha).

4. *Legal Education Reform*, *supra* note 1.

characterized by rising costs, declining applications, reduced job placements, and disaffected students.<sup>5</sup>

This essay explores challenges confronting legal education. Contrary to conventional wisdom, it argues that the fundamental problem is a lack of consensus over what the problem is. Legal educators and regulators are developing well-intended but inadequate responses to the symptoms, not the causes, of law school woes. Our profession is, as Bill Henderson put it, failing to “take serious issues seriously.”<sup>6</sup>

The discussion that follows proceeds in five parts. Part II focuses on the financial issues that have precipitated much of the current criticism of legal education. Part III examines the structural problems that underpin many of law schools’ economic woes. Part IV looks at curricular issues, and the vexed balance between theory and practice that has long fueled critics of the legal academy. Part V addresses concerns about values in law schools, such as those involving legal ethics, public service, diversity, and professional fulfillment. Part VI concludes with some thoughts about the resistance to reform and strategies for change.

## II. FINANCES

American legal education has come a considerable distance from Thomas Jefferson’s view that “[a]ll that is necessary for a law student is access to a library and directions in what order the books are to be read.”<sup>7</sup> The Council of the American Bar Association Section of Legal Education and Admissions to the Bar prescribes a vast range of expensive requirements as a condition of accrediting law schools, including three years of post-graduate study; job security for faculty; an extensive library and physical plant; and limits on the number of courses that can be taught online or by

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5. TAMAHANA, *supra* note 2, at 126–28, 160–66 (rising costs, declining applications); Maulik Shah, *The Legal Education Bubble: How Law Schools Should Respond to Changes in the Legal Market*, 23 GEO. J. LEGAL ETHICS 843, 846–47 (2010) (rising costs); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 608 (2010) (job market). A survey by the Law School Admission Council found that 45% of the 143 schools that responded had fallen short of their enrollment targets for the 2011 class. Katherine Mangan, *Law Schools on the Defensive over Job-Placement Data*, CHRON. HIGHER EDUC., Oct. 21, 2011, at A16. See also Karen Sloan, *It’s a Buyer’s Market at Law School*, NAT’L L.J. (June 25, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560485444&thepage=1> (applications down 25% over two years). For jobs see *infra* text accompanying notes 28–29. For student disaffection see *infra* text accompanying notes 32–35.

6. William Henderson, *Waking Up Law Professors*, NAT’L L.J. L. SCH. REV. (Nov. 3, 2011, 10:18 AM), <http://legaltimes.typepad.com/lawschoolreview/2011/11/waking-up-law-professors.html>.

7. Letter from Thomas Jefferson to John Garland Jefferson (June 11, 1790), in WRITINGS 966 (Merrill P. Peterson ed., 1984).

adjuncts.<sup>8</sup> Even applying for accreditation is a costly process. An irony that did not escape notice by one low-budget law school recently applying for accreditation was that seven of its administrators had to fly from Tennessee to Puerto Rico to make a brief presentation at the Ritz Carlton, where the Council was meeting.<sup>9</sup>

A further influence on costs—and, according to most legal educators, an even more important one than accreditation—is the annual ranking of schools by *U.S. News and World Reports*.<sup>10</sup> One of the easiest ways to boost their scores is for schools to spend more in areas rewarded by the *U.S. News* formula.<sup>11</sup> Two examples are expenditures per student and faculty student ratios, which have risen dramatically in the decades since the rankings went into effect.<sup>12</sup> Another factor is students' median GPA and LSAT scores; schools have incentives to spend more on merit scholarships to attract high-scoring applicants.<sup>13</sup> Because those individuals also are likely to perform the best academically, and to obtain the highest paying jobs, the practice amounts to a reverse Robin Hood transfer; tuition payments by poorer students subsidize scholarships for richer ones.<sup>14</sup> Schools also can do better in the rankings if they spend more on faculty resources and on glitzy events and publications that enhance the school's reputation.<sup>15</sup> Reputational

8. AM. BAR ASS'N, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf).

9. David Segal, *For Law Schools, a Price to Play the A.B.A.'s Way*, N.Y. TIMES, Dec. 18, 2011, at B4.

10. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 25 (2009), available at <http://www.gao.gov/assets/300/297206.pdf>; see also MARTHA DAUGHERTY ET AL., AMERICAN BAR ASSOCIATION REPORT OF THE SPECIAL COMMITTEE ON THE U.S. NEWS AND WORLD REPORT RANKINGS, 3–4 (2010), available at <http://ms-jd.org/files/f.usnewsfinal-report.pdf>.

11. Maulik Shah, *The Legal Education Bubble: How Law Schools Should Respond to Changes in the Legal Market*, 23 GEO. J. LEGAL ETHICS 843, 847 (2010).

12. *Id.*; Debra Cassens Weiss, *Study Partly Blames Higher Law School Tuition on 40% Leap in Faculty Size*, A.B.A. J. DAILY NEWS, (Mar. 10, 2010, 10:20 AM), [http://www.abajournal.com/news/article/study\\_blames\\_higher\\_law\\_school\\_tuition\\_on\\_40\\_leap\\_in\\_faculty\\_size](http://www.abajournal.com/news/article/study_blames_higher_law_school_tuition_on_40_leap_in_faculty_size).

13. Shah, *supra* note 11, at 847.

14. Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1581 (2011); see also Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here and Where We Go Now*, 45 CREIGHTON L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=18989114>; William Henderson & Andrew Morris, *What Rankings Don't Say About Costly Choices*, NAT'L L.J., April 15, 2008, LEXIS 900005508485.

15. Bourne, *supra* note 14; see also Gene R. Nichol, *Rankings, Economic Challenge, and the Future of Legal Education*, 61 J. LEGAL EDUC. 345, 349 (2012) (discussing ways schools maximize expenditures to improve rankings).

surveys, which count for 40% of each school's position, are a particularly inadequate proxy for educational quality.<sup>16</sup> Few of those surveyed have enough systematic knowledge about a sufficient number of institutions to make accurate comparative judgments.<sup>17</sup> Most participants rely on the word-of-mouth reputation and prior rankings, which makes the process self-perpetuating.<sup>18</sup> This explains why the Massachusetts Institute of Technology law school always does so well even though it does not exist.<sup>19</sup> Moreover, the ranking system excludes many factors that materially affect a student's educational experience, such as access to clinical courses, pro bono opportunities, and a diverse faculty and student body.<sup>20</sup>

This is not to suggest that rankings are entirely without value. Some relevant characteristics can be objectively assessed, and schools should be accountable for their relative performance. In the absence of comparative data, law school applicants would likely encounter an educational Lake Woebegeon, in which every institution claimed to be above average.<sup>21</sup> But the current system distorts spending priorities.<sup>22</sup> *U.S. News* assigns arbitrary weights to incomplete measures, uses flawed reputational surveys as proxies for quality, and forces schools to compete in an academic arms race that inflates expenses.<sup>23</sup>

Taken together, the rankings and accreditation requirements have encouraged a rapid increase in tuition.<sup>24</sup> Over the last three decades, the price of a legal education has increased approximately three times faster than the average household income.<sup>25</sup> From 1989 to 2009, when the cost of a college education grew by 71%, law school tuition rose 317%.<sup>26</sup> The

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16. For the rankings methodology, see Robert Morse & Sam Flanagan, *Methodology: Law School Rankings*, U.S. NEWS: EDUC. (March 12, 2012), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings>.

17. See ROGER L. GEIGER, KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE 149 (2004); Terry Carter, *Rankled by the Rankings*, 84 A.B.A. J. 46, 49 (1998); Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Rankings of ABA Law Schools*, AM. ASS'N L. SCH. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html#intro>.

18. Carter, *supra* note 17, at 49.

19. *Id.*

20. See Klein & Hamilton, *supra* note 17.

21. See *id.* (noting that there is no other generally accepted competing set of school rankings).

22. See *supra* notes 7–20 and accompanying text.

23. See Klein & Hamilton, *supra* note 17.

24. See *supra* notes 7–20 and accompanying text.

25. Bill Henderson, *Law School 4.0: Are Law Schools Relevant to the Future of Law?*, EMPIRICAL LEGAL STUD. (July 2, 2009, 11:58 AM), [http://www.elsblog.org/the\\_empirical\\_legal\\_stu di/2009/07/are-law-schools-part-of-problem-or-the-solution.html](http://www.elsblog.org/the_empirical_legal_stu di/2009/07/are-law-schools-part-of-problem-or-the-solution.html).

26. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, [http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=1&pagewanted=all).

average debt for law school graduates tops \$100,000.<sup>27</sup> Only about two thirds of those who graduated from law school in 2010 secured full time legal jobs, and those who did and reported income had a median salary of \$63,000, which was inadequate to cover average debt levels.<sup>28</sup> Overall, law students in 2010 borrowed at least \$3.7 billion to pay for their legal education.<sup>29</sup> Unsurprisingly, debt burdens are unevenly spread and amplify racial and class disadvantages.<sup>30</sup>

Student loans are generally not dischargeable in bankruptcy and often cause substantial hardship.<sup>31</sup> A representative example is the graduate of Loyola Law School in Chicago who abandoned her plans to become a prosecutor because of a \$200,000 debt load that she still could not pay off while working for a midsize corporation.<sup>32</sup> As she told the *New York Times*,

Right now, loans control every aspect of my life. . . . Where I practice, the number of children I'll have, where I live, the type of house I can live in. I honestly believe I'll be a grandparent before I pay off my loans. I have yet to make even a dent in them.<sup>33</sup>

A graduate of Thomas Jefferson School of Law described even greater difficulties in trying to meet obligations on a \$150,000 loan:

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27. Brian Z. Tamahana, *How to Make Law School Affordable*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html>; see also Ryan Lytle, *10 Law Schools That Lead to the Most Debt*, U.S. NEWS, Mar. 22, 2012, <http://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/2012/03/22/10-law-schools-that-lead-to-the-most-debt>.

28. Press Release, Ass'n for Career Legal Prof'ls, Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice (June 7, 2012), available at <http://www.nalp.org/2011selectedfindingsrelease>; see also William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last If Law Grads Can't Pay Bills?*, A.B.A. J., Jan. 2012, at 32, 36; Martha Neil, In "Perfect Storm" of Hard-to-Find Jobs and Stagnant Pay, Law Grads Can't Escape Hefty Student Loans, A.B.A. J. DAILY NEWS (Feb. 6, 2012, 7:47 AM), [http://www.abajournal.com/news/article/more\\_recent\\_law\\_grads\\_likely\\_are\\_filing\\_for\\_bankruptcy](http://www.abajournal.com/news/article/more_recent_law_grads_likely_are_filing_for_bankruptcy). Those reporting income may be on the higher end of the salary curve, so the actual median figure may be lower. See ASS'N CAREER LEGAL PROFS., NALP BULLETIN: STARTING SALARIES RE-EXAMINED: A CRITICAL LOOK AT AVERAGES (Oct. 2010), available at <http://www.nalp.org/oct2010adjustedsalmean>.

29. Henderson & Zahorsky, *supra* note 28, at 32, 36.

30. Bourne, *supra* note 14 (noting higher debt burdens for African Americans and those from lower income backgrounds).

31. Neil, *supra* note 28.

32. Segal, *supra* note 9, at B5 (quoting Keri-Ann Baker).

33. *Id.* at B5 (quoting Keri-Ann Baker).

For eight years, I have never had a steady job, just on-and-off document review. . . . [A]fter sending out literally thousands of resumes over the years I have given up. In the “good” years, I used to work 80 hours a week, and half my salary would go to student loans. In the last couple of “bad” years, I haven’t been able to pay my loans, and the work has been so unsteady that I have been evicted from my apartment and have had to resort to food stamps. Furthermore, despite eight years having gone by, my loan balance has decreased by just 10 percent. I will never get out of this debt trap, will never own my own home, nor will I be ever able to afford children. . . . I have contemplated suicide.<sup>34</sup>

The sense of betrayal among those with crushing debt burdens is apparent in blogs running under titles such as “Shilling Me Softly,” “Jobless Juris Doctor,” and “Exposing the Law School Scam.”<sup>35</sup>

Concerns about oversupply of lawyers are, of course, nothing new. In 1927, the then Dean of Stanford Law School declared:

We have more lawyers today than there is any legitimate need for. The truth is that we are simply being swamped with aspiring young lawyers, most of whom will necessarily and within a few years after admission, drift into real estate, insurance and related lines, and that is not a process calculated to help the reputation of our profession.<sup>36</sup>

However, most commentators see the current difficulties for graduates as on a different order of magnitude, partly due to unprecedented debt burdens.<sup>37</sup> And the difficulties are likely to persist.<sup>38</sup> Although the federal government and most law schools offer some loan repayment assistance to graduates who take public interest jobs, law school programs are often insufficiently funded and the federal programs do not provide full discharge

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34. Steven J. Harper, *Suffering in Silence*, AM. LAW., Sept. 1, 2011, at 83, available at [http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202511938585&Suffering\\_in\\_Silence&slr\\_eturn=20120815112418](http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202511938585&Suffering_in_Silence&slr_eturn=20120815112418).

35. For further examples see Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 745–46 n.58 (2011).

36. John W. Reed, *On Being Watched: Modeling the Profession During Uncertain Times*, B. EXAMINER, June 2011, at 6, 8 (quoting Marion Kirkwood).

37. See Laura A. Calloway & Brad Carr, *Summary Report: Survey of New Admittees Regarding Law Student Debt and Post-Law School Employment*, 72 ALA. LAW. 193, 193 (2011); Carasik, *supra* note 35, at 759–61.

38. See Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67, 109–10 (2010); Carasik, *supra* note 35, at 814–18.

until after ten years of public interest employment.<sup>39</sup> Nor do these programs address the fundamental problem of lack of jobs, public interest or otherwise, that makes law school a questionable investment. A recent report found only half as many entry level job openings as individuals passing the bar.<sup>40</sup> Nationally, only 55% of the class of 2011 had full-time long-term jobs for which a law degree was preferred.<sup>41</sup> Most knowledgeable observers believe that the situation is unlikely to improve even after the economy rebounds.<sup>42</sup> More employers are relying on paralegals, technology, outsourcing, and contract attorneys to do work previously performed by recent graduates, and cash-strapped public sectors are unable to expand hiring even in the face of significant needs.<sup>43</sup>

As debt burdens are rising and employment prospects are declining, fewer individuals are taking the LSAT and applying to law schools.<sup>44</sup> The number of test takers has declined 25% in the last two years, and applications are at a twenty-five year low.<sup>45</sup> Still, demand for legal education exceeds the jobs available, which raises the question of why so

39. College Cost Reduction and Access Act of 2007, 121 Stat. 784 (2007); Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583, 583 (2010). See ABA COMMISSION ON LOAN REPAYMENT & FORGIVENESS, *LIFTING THE BURDEN: LAW SCHOOL DEBT AS A BARRIER TO PUBLIC SERVICE* (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lrap/lrapfinalreport.authcheckdam.pdf>.

40. *Pro/Con: Is Law School a Reasonable Choice for New Graduates*, PA. LAW., Jan.–Feb. 2012, at 19 (summarizing findings of a report by Economic Modeling Specialists). See also Bourne, *supra* note 14, citing estimates of 30,000 jobs for 44,000 new lawyers.

41. Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 26, 2012, at A1, A2.

42. TAMAHANA, *supra* note 2; RICHARD SUSKIND, *THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES* (2009); William Henderson & Rachel M. Zahorsky, *Job Stagnation May Have Started before the Recession, and it May be a Sign of Lasting Change*, A.B.A. J. DAILY NEWS (July 8, 2011, 4:15 PM), [http://www.abajournal.com/news/article/law\\_job\\_stagnation\\_may\\_have\\_started\\_before\\_the\\_recessionand\\_it\\_may\\_be\\_a\\_sig/](http://www.abajournal.com/news/article/law_job_stagnation_may_have_started_before_the_recessionand_it_may_be_a_sig/); THOMAS S. CLAY & ERIC A. SEEGER, *LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY* (2010), available at [http://www.altmanweil.com/dir\\_docs/resource/1667e5c8-b99e-4557-93ac-73174118ea29\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/1667e5c8-b99e-4557-93ac-73174118ea29_document.pdf).

43. See Mary C. Daley & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 28 GEO. J. INT'L L. 401, 406, 410–11 (2007); Ashby Jones, *The Next Threat to Associate Hiring? It's Elementary, My Dear . . .*, WALL ST. J. L. BLOG (Feb. 15, 2011, 10:50 AM), <http://blogs.wsj.com/law/2011/02/15/the-next-threat-to-associate-hiring-its-elementary-my-dear/>.

44. David Segal, *For 2nd Year, A Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 19, 2012, <http://www.nytimes.com/2012/03/20/business/for-lsat-sharp-drop-in-popularity-for-second-year.html>; Brian Tamahana, *The Law School Crunch Is Here—Finances and Quality to Suffer*, BALKINIZATION BLOG (Apr. 9, 2012 at 10:11 AM), <http://balkin.blogspot.com/2012/04/law-school-crunch-is-here-finances-and.html>.

45. See Segal, *supra* note 44; Tamahana, *supra* note 44.



many students have made the high-risk decision to attend law school.<sup>46</sup> Part of the problem has been the lack of transparency in school disclosures about placement and salaries, a problem that has triggered class action lawsuits and proposed ABA standards.<sup>47</sup> Other applicants, subject to biases toward optimism, have engaged in “magical thinking.”<sup>48</sup> Their assumption has been that they, unlike their classmates, will find well-paying jobs despite adverse market conditions.<sup>49</sup> In one survey, a majority of prospective law students reported that they were “very confident” that they would find a legal job after graduating, but only 16% were “very confident” that the majority of their classmates would do the same.<sup>50</sup> But as Brian Tamahana notes, even the most rational students will have difficulties assessing the long-term return on investment in law school, given the lack of empirical information, and the disputes and uncertainties over how to calculate economic return.<sup>51</sup>

Whatever the causes, the inability of many students to pay back loans may have collective as well as individual impact. A substantial default rate will encourage Congress to reconsider providing easy credit to law

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46. Bourne, *supra* note 14 (citing estimates of 30,000 jobs for 44,000 new lawyers); *see also* Palazzolo, *supra* note 41.

47. The suits allege that the schools’ reports of placement rates failed to disclose how many positions required a legal degree or were funded by the school, and that their reports of salary figures failed to disclose response rates. Complaint, *Alburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. filed May 26, 2011); *Gomez-Jinenez v. N.Y. Law School*, 943 N.Y.S.2d 834 (Sup. Ct. 2012); *MacDonald v. Thomas M. Cooley Law School*, No. 11-CV-00831, 2012 WL 2994107 (W.D. Mich. July 20, 2012); Staci Zaretski, *Fifteen More Law Schools to Be Hit With Class Action Lawsuits Over Post-Grad Employment Rates*, ABOVE L. (Oct. 5, 2011, 2:50 PM), <http://abovethelaw.com/2011/10/fifteen-more-law-schools-to-be-hit-with-class-action-lawsuits-over-post-grad-employment-rates/>. The suit brought against New York Law School has been dismissed. Joe Palazzolo & Jennifer Smith, *Law School Wins in Graduate Suit*, WALL ST. J., March 22, 2012, at B2. The ABA’s proposed standards would require such disclosures. Dana Olsen, *Truth in Admitting, Law School Transparency Fights for the Rights of the Soon-to-be-Enrolled*, AM. LAW., July–Aug. 2011, at 16; Mark Hansen, *ABA Committee Approves New Law School Disclosure Requirements*, A.B.A. J. DAILY NEWS (Jan. 17, 2012, 5:19 PM), [http://www.abajournal.com/news/article/aba\\_committee\\_recommends\\_new\\_law\\_school\\_disclosure\\_requirements/](http://www.abajournal.com/news/article/aba_committee_recommends_new_law_school_disclosure_requirements/).

48. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at A1; Karen Sloan, *What Are They Thinking?: Law School Applications Are Increasing Despite Dark Career Prospects*, NAT’L L.J., July 12, 2010, at 1, 1. For general accounts of the bias toward optimism see Tali Sharot, *THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN* (2011); PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT* 405–08 (2010).

49. Press Release, Kaplan Test Prep, *Kaplan Survey: Despite Challenging Job Market, Tomorrow’s Lawyers Appear to Have a Healthy Outlook on Their Own Job Prospects, but Not Their Classmates’* (Apr. 12, 2012), *available at* <http://press.kaptest.com/press-releases/kaplan-survey-despite-challenging-job-market-tomorrow%E2%80%99s-lawyers-appear-to-have-a-healthy-outlook-on-their-own-job-prospects-but-not-their-classmates%E2%80%99>.

50. *Id.*

51. TAMAHANA, *supra* note 2, at 143–45.

students.<sup>52</sup> And a tightening of the credit market could further reduce the applicant pool and make a bad situation for law schools worse.

There are other social costs of the high price of legal education in terms of who can afford to attend law school and what kinds of jobs students can afford to take after graduation.<sup>53</sup> Many are priced out of the market where demand for services is greatest.<sup>54</sup> It is a shameful irony that the nation with the highest concentration of lawyers fails so miserably at making their services available to those who need them most.<sup>55</sup> Bar surveys have consistently found that over four-fifths of the legal needs of low-income individuals, and two- to three-fifths of those of middle-income individuals, remain unmet.<sup>56</sup> The problems have been compounded in the recent economic downturn.<sup>57</sup> High rates of unemployment, bankruptcies, foreclosures, and reductions in social services have created more demands for legal representation at the same time that many of its providers have faced cutbacks in their own budgets.<sup>58</sup> Yet after three years of expensive legal education, graduates are unable to generate sufficient income from this kind of work to pay off their debts and sustain a legal practice.<sup>59</sup> The perverse result is an oversupply of lawyers and an undersupply of legal services.<sup>60</sup>

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52. Henderson & Zahorsky, *supra* note 42.

53. See Macchiarola & Abraham, *supra* note 38, at 109–10.

54. See DEBORAH L. RHODE, ACCESS TO JUSTICE 79, 164 (2004).

55. RHODE, *supra* note 54, at 3.

56. See *id.*; Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. (forthcoming 2012) (suggesting higher figures since the recession).

57. Karen Sloan, *Perfect Storm Hits Legal Aid*, NAT'L L.J., Jan. 3, 2011, at 1.

58. Emily Savner, *Expand Legal Services Now*, NAT'L L.J., June 28, 2010, at 46 (reporting increases in demand and 75% drop in IOLTA (Interest on Lawyers Trust Fund Accounts) funds between 2007 and 2009); Sloan, *supra* note 57, at 1, 4 (noting decline in funds from government IOLTA, and tight private fundraising climate, together with increased demand for services); Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12 (reporting a 30% increase in requests for legal aid); RICHARD ZORZA, ACCESS TO JUSTICE: ECONOMIC CRISIS CHALLENGES, IMPACTS, AND RESPONSES 8–9 (2009) available at <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=185&fileame=186.pdf> (finding that a majority of judges reported increase in pro se caseloads, but that 39% also reported cuts in self-help services' budgets).

59. See Steven J. Harper, *Suffering in Silence*, AM. LAW., Sept. 1, 2011, [http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202511938585&Suffering\\_in\\_Silence&slreturn=20120815112418](http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202511938585&Suffering_in_Silence&slreturn=20120815112418); RHODE, *supra* note 54, at 167.

60. RHODE, *supra* note 54, at 79.

### III. STRUCTURE

Part of the reason for this asymmetry in supply and demand involves the structure of legal education mandated by accreditation standards. The American Bar Association adopted the first of these standards in 1922, and the federal Secretary of Education subsequently recognized the Council of the Association's Section of Legal Education and Admission to the Bar as the official credentialing organization for law schools.<sup>61</sup> All but a few states require graduation from an accredited law school as a condition for practice, so the Council significantly influences the structure of legal education.<sup>62</sup> Although there is a strong justification for some form of oversight of American law schools, the current review process is flawed in several important respects.

The rationale for a system of accreditation is that a totally free market would not provide sufficient quality control.<sup>63</sup> Students, the most direct beneficiaries of legal education, have limited information about the relative cost-effectiveness of particular schools, and limited capacity to assess the information that is available.<sup>64</sup> Seldom do they have a basis for judging how characteristics like faculty/student ratios or reliance on adjuncts will affect their educational experience. Moreover, student interests are not necessarily consistent with those of the ultimate consumers—clients and the public. Education is one of the rare contexts where buyers may want less for their money. Many students would like to earn a degree with the minimal expense and effort necessary to pass a bar examination and land a job. In the absence of accreditation standards, law schools would need to compete for applicants who view “less as more” in terms of academic requirements. The problem would be compounded by similar attitudes among central university administrators. Without minimum requirements imposed by an accrediting body, more law schools might be forced to get by with fewer

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61. The Higher Education Act of 1965, 20 U.S.C. § 1001 (2006), limited federal loans to students of higher educational institutions accredited by an organization that the Secretary of Education designated as the accrediting authority. In a subsequent ruling the Secretary required that the Council be able to act independently without final authority resting in the ABA. For a description of the process, see Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471 (2011).

62. NAT'L CONF. B. EXAMINERS & A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012, at 8–14 (Eric Moeser & Claire Huisman eds., 2012), available at [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf); see also Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Exposé on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 3, 5, 11 (2003).

63. See Jonathan E. Smaby, Letter to the Editor, *Weighing the Value of a Law Degree*, N.Y. TIMES, Oct. 27, 2011, <http://www.nytimes.com/2011/10/28/opinion/weighing-the-value-of-a-law-degree.html>; see also Areen, *supra* note 61, at 1481–82.

64. See Olsen, *supra* note 47; Segal, *supra* note 48, at A1.

resources in order to subsidize less well-off academic departments. Finally, such requirements can provide a useful catalyst to self-scrutiny and peer review.<sup>65</sup>

Although these justifications support some form of oversight, the current process falls well short of protecting public interests. A threshold problem lies in the composition of the Council. A majority of members are lawyers and judges with little or no experience as legal educators.<sup>66</sup> Nor are they sufficiently independent of the profession, which has an obvious stake in limiting competition, preserving status, and preventing overcrowding.<sup>67</sup> However well-intentioned, no occupational group is well positioned to make disinterested judgments on matters where its own livelihood is so directly implicated.

A related problem is that the current system substitutes detailed regulation of educational inputs for more direct measures of educational outputs. It uses observable measures such as facilities, resources, and faculty/student ratios as highly imperfect predictors of the quality of teaching and research.<sup>68</sup> Moreover, unlike the systems of accreditation for higher education generally, law school standards do not seek to enhance cost-effectiveness, or to permit diversity in light of schools' particular missions.<sup>69</sup> Rather, they impose a one-size-fits-all structure that stifles innovation and leaves many students both underprepared and overprepared to meet societal needs.<sup>70</sup> Graduates are over qualified to offer many forms of routine assistance at affordable costs, and often under qualified in practical and interdisciplinary skills.

Accreditation structures have failed to recognize in form what is true in fact. Legal practice is becoming increasingly specialized and it makes little sense to require the same training for a Wall Street securities lawyer and a small town family practitioner. Three years in laws school and passage of a bar exam is neither necessary nor sufficient to guarantee proficiency in many areas where routine needs are greatest, such as uncontested divorces, landlord-tenant matters, immigration, and bankruptcy.<sup>71</sup> Other countries

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65. See Areen, *supra* note 61, at 1471, 1472, 1481–82.

66. Areen, *supra* note 61, at 1492.

67. *Id.* at 1486.

68. See generally Douglas W. Kmiec, *Law School Accreditation: Responsible Regulation or Barrier to Entry?*, 11 TEX. REV. L. & POL. 377, 379 (2007).

69. Areen, *supra* note 63, at 1490–91.

70. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 366 (2006).

71. RHODE, *supra* note 54, at 3, 89, 198 & n.29 (2004); HERBERT M. KRITZER, *LEGAL*

allow non-lawyer experts to provide such services without demonstrably adverse effects.<sup>72</sup> The diversity in America's legal demands argues for greater diversity in its educational structures.

#### IV. CURRICULA

To paraphrase legal realist Fred Rodell, there are only two things wrong with traditional law school teaching. One is style; the other is content.<sup>73</sup> Although the curricula has improved substantially in recent decades, the dominant approach has remained a combination of lecture and Socratic dialogue that focuses on doctrinal analysis. From a pedagogic standpoint, this approach leaves much to be desired. Its hierarchical and competitive climate discourages participation by many students, particularly women, and fails to supply enough opportunities for interactive learning, teamwork, and feedback.<sup>74</sup> All too often, the search for knowledge becomes a scramble for status, with students vying to impress rather than inform.

A further problem with traditional approaches is insufficient attention to practical skills.<sup>75</sup> Although most law schools have responded to this longstanding criticism with expanded clinical offerings and related initiatives, these remain at the margins of the curriculum.<sup>76</sup> Only 3% of schools require clinical training, and a majority of students graduate without it.<sup>77</sup> These students often lack other opportunities to develop cross-cultural competence and an understanding of how law functions, or fails to function, for the have-nots. Schools are similarly weak in non-clinical courses that integrate experiential approaches and address practice-oriented topics, such as problem solving, marketing, practice and project management,

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ADVOCACY 193–203 (1998).

72. See RHODE, *supra* note 54, at 15, 198 & n.29.

73. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936). Rodell made the comment about legal scholarship, but his criticism extended to most aspects of legal education.

74. For adverse effects, see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 3 (2007). For women's lower participation rates, see sources cited in KATHERINE BARTLETT, ANGELA P. HARRIS, & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 468 (3d ed. 2010) and discussion *infra* notes 104–08 and accompanying text. For ineffective pedagogy, see Lawrence Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 2–11 (1999); Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367–369 (1999). For lack of feedback, see Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 597 (2008).

75. Chemerinsky, *supra* note 74, at 598; see also David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

76. For new initiatives, see Patrick G. Lee, *Law Schools Get Practical*, WALL ST. J., July 11, 2011, at B5. For their marginalization, see Segal, *supra* note 75, at A1; Karen Sloan, *Stuck in the Past, What Is Law School for, Anyway?*, NAT'L L.J., Jan. 16, 2012, at 1, 1 (quoting Susan Hackett's dismissal of initiatives as "tweaking around the edges.").

77. Segal, *supra* note 75, at A1.

interpersonal dynamics, organizational behavior, and information technology.<sup>78</sup> According to one survey, close to two-thirds of students and 90% of lawyers feel that law school does not teach the practical skills necessary to succeed in today's economy.<sup>79</sup> Too many schools also lack sequenced interdisciplinary programs that would better prepare students in areas including finance, intellectual property, organizational dynamics, public interest, and environmental law.<sup>80</sup> Another gap involves preparation for leadership. Although no occupation produces such a large proportion of leaders as law, and leadership development is now a forty-five billion dollar industry, the creation of leadership curricula for legal education has lagged behind.<sup>81</sup> Many law schools' mission statements include fostering leadership, but only two of these schools actually offer a leadership course.<sup>82</sup>

Although administrators often acknowledge these gaps, they view correctives as luxuries that students can ill afford.<sup>83</sup> Yet not all experiential, practice-oriented initiatives require additional costly investments. Much can be accomplished with existing resources through case histories, problems, simulations, cooperative projects, and interdisciplinary collaboration. The problem is less that these approaches are unaffordable than that they are unrewarded. Curricular improvements are not well-reflected in rankings, and legal employers have not made practical training a priority in hiring.<sup>84</sup> Nor have faculty seen excellence and innovation in teaching as the path to greatest recognition.<sup>85</sup> Significant progress is likely to require a substantial change in academic reward structures.

78. Jane Porter, *Lawyers Often Lack the Skills Needed to Draw, Keep Clients*, WALL ST. J., May 20, 2009, at B5; William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 437 (2011).

79. LEXIS-NEXIS, STATE OF THE LEGAL INDUSTRY SURVEY 7 (2009).

80. Chemerinsky, *supra* note 74, at 598.

81. For lawyer leaders see Deborah L. Rhode, *Lawyers and Leadership*, 20 PROF. LAW., no. 3, 2010, at 1, 11–12. For expenditures on leadership development see Doris Gomez, *The Leader as Learner*, 2 INT'L J. LEADERSHIP STUD. 280, 281 (2007). For inadequate law school curricula see Nitin Nohria & Rakesh Khurana, *Advancing Leadership Theory and Practice*, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 3 (Nitin Nohria & Rakesh Khurana eds. 2010).

82. Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 ST. THOMAS L.J. 358, 370 (2009).

83. Sloan, *supra* note 76, at 5.

84. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, N.Y. ST. B. ASS'N J., Oct. 2010, at 20, 24; Patrick G. Lee, *supra* note 76, at B5 (quoting Timothy Lloyd's observation that practical skills don't make "much of a difference").

85. Segal, *supra* note 75, at A22. The problem is not unique to law schools. For inadequate recognition of teaching in academic reward structures, see DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE 63, 73 (2006).

## V. VALUES

A final set of problems with legal education involves the values that it fosters, or fails to foster, concerning professional responsibility and professional identity. The recent Carnegie Foundation report brought renewed attention to longstanding concerns about the marginalization of legal ethics.<sup>86</sup> Most schools relegate the subject to a single required course, which focuses on the rules of professional conduct that are tested on the bar's multiple choice exam.<sup>87</sup> The result is legal ethics without the ethics.<sup>88</sup> A rules-oriented course also leaves out problems in regulatory structures, the delivery of services, and legal workplaces. In one survey, a majority of professors reported spending no time or less than two hours on the structure of the profession, including issues of discrimination and the realities of practice; 90% spent no time or less than two hours on pro bono service.<sup>89</sup>

Such oversights reflect deep-seated skepticism about the importance of professional ethics in professional education.<sup>90</sup> Many professors believe that values cannot be taught, should not be taught, or are beyond the competence of law schools to teach.<sup>91</sup> Although most students report that their school emphasizes ethics, only half of students feel that law school has prepared them well to deal with ethical dilemmas in practice and even fewer feel that they had have help in developing "a personal code of values and ethics."<sup>92</sup>

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86. WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 145 (2007).

87. *Id.* at 145, 187; Ann Colby & William Sullivan, *Legal Education Gives Ethics Training Short Shrift*, S.F. DAILY J., Jan. 18, 2007, at 6.

88. This claim has been made before. See Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24 (1999); Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1047–1049 (2007). For the focus of ethics classes, see ANDREW M. PERLMAN ET AL., *A SURVEY OF PROFESSIONAL RESPONSIBILITY COURSES AT AMERICAN LAW SCHOOLS IN 2009* (2009), available at <http://www.legalethicsforum.com/files/pr-survey-results-final.pdf> (last visited Oct. 10, 2012). For the pressure that faculty feel to teach to the bar, see Steven Gillers, *Eat Your Spinach*, 52 ST. LOUIS U. L.J. 1215, 1219 (2007).

89. PERLMAN ET AL., *supra* note 88.

90. See generally Neil Hamilton & Vera Munson, *Answering the Skeptics on Fostering Ethical Professional Formation*, 20 PROF. LAW., no. 4, 2011, at 3.

91. For the assumption that values cannot be taught to adult law students, see SULLIVAN ET AL., *supra* note 86, at 133; Hamilton & Munson, *supra* note 90, at 3. For the assumption that values should not be taught in a pluralist society, see W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711 (2002). For skepticism about the capacity of law schools see SULLIVAN ET AL., *supra* note 86, at 132–33; Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 373, 376–77 (2011).

92. LAW SCH. SURVEY OF STUDENT ENGAGEMENT, *STUDENT ENGAGEMENT IN LAW SCHOOLS: IN CLASS AND BEYOND* 7–9, 14–15 (2010), available at [http://lssse.iub.edu/pdf/2010/2010\\_LSSSE\\_Annual\\_Survey\\_Results.pdf](http://lssse.iub.edu/pdf/2010/2010_LSSSE_Annual_Survey_Results.pdf). See Richard Acella, *Street Smarts: Law Schools Explore Benefits of Teaching Ethics in a Clinical Setting*, A.B.A. J., June 2011, at 26.

Such narrowly focused approaches to ethics and values underestimate the role that broader coverage can play in developing ethical judgment.<sup>93</sup> Law schools cannot be value-neutral on questions of values. Their curriculum and culture inevitably influence the formation of professional identity and the ethical norms underpinning it.<sup>94</sup> Given that reality, faculty need to be more intentional about the messages they inevitably communicate. If, as the Preamble to the ABA Model Rules of Professional Conduct maintains, a lawyer is a “public citizen having a special responsibility for the quality of justice,” that responsibility should be reflected and reinforced throughout the law school experience.<sup>95</sup>

A substantial body of evidence indicates that significant changes occur during early adulthood in individuals’ basic strategies for dealing with moral issues.<sup>96</sup> Through interactive education, such as mentoring, problem-solving, and role-playing, students can enhance their skills in moral analysis and gain awareness of the situational pressures and regulatory failures that underpin misconduct.<sup>97</sup> Failure to adopt such approaches, and to integrate professional responsibility issues throughout the curriculum, undermines their significance. A minimalist attitude toward ethics marginalizes its significance. Educational priorities are apparent in subtexts as well as texts. What the curriculum leaves unsaid sends a powerful message, and faculty cannot afford to treat professional responsibility as someone else’s responsibility.

The same is true of pro bono service. Although the vast majority of schools have pro bono programs, only a minority of students participate.<sup>98</sup>

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93. Hamilton & Munson, *supra* note 90, at 3.

94. See Eli Wald & Russell G. Pearce: *Denial and Accountability in Legal Education: How Law Schools Fail to Meet Their Responsibility for the Formation of Professional Identity*, 24 ST. THOMAS L. REV. (forthcoming 2012); SULLIVAN ET AL., *supra* note 86, at 139; Neil W. Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 475 (2008).

95. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (2011).

96. Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 FORDHAM L. REV. 333, 342 (2003); SULLIVAN ET AL., *supra* note 96, at 135; M. Neil Browne et al., *The Purported Rigidity of an Attorney’s Personality: Can Legal Ethics be Acquired?*, 30 J. LEGAL PROF. 55, 66 (2006); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 507-08 (1995); Neil Hamilton & Lisa M. Babbitt, *Fostering Professionalism Through Mentoring*, 37 J. LEGAL EDUC. 102, 116 (2007); NAT’L RESEARCH COUNCIL, HOW PEOPLE LEARN 51-78 (John D. Bransford et al. eds., 2000).

97. See, e.g., Hamilton & Babbitt, *supra* note 96, at 119.

98. LAW SCH. SURVEY STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOLS: A FIRST LOOK 8 (2004), available at, [http://lsse.iub.edu/2004\\_annual\\_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf](http://lsse.iub.edu/2004_annual_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf). Only two schools reported faculty requirements. AM. BAR.



Only about 10% of schools require service, fewer still impose demands on faculty, and the amounts required are sometimes quite minimal; half the schools mandate only ten to twenty hours from students.<sup>99</sup> Moreover, the quality of some programs is open to question. Many students lack on-site supervision or a classroom opportunity to discuss their work or pro bono issues generally.<sup>100</sup> In my own national pro bono survey, only 1% of attorneys reported that the issue received coverage in their law school orientation programs or professional responsibility courses; only 3% observed visible faculty support for pro bono work.<sup>101</sup> An American Bar Foundation survey of recent law graduates ranked pro bono last on a list of educational experiences that practitioners felt had assisted them significantly in practice.<sup>102</sup> In the words of a Commission of the Association of American Law Schools on pro bono opportunities: “law schools should do more.”<sup>103</sup> Part of the professional responsibility of professional schools is to build cultures of commitment to the bar’s core values of public service.

Law schools should also do more to address issues of diversity, and the biases based on race, gender, ethnicity, disability, and sexual orientation that continue to impair the educational environment.<sup>104</sup> For example, women, particularly women of color, are less likely to speak in class, report fewer opportunities for faculty mentoring, and experience higher levels of dissatisfaction, disengagement, and self-doubt than men.<sup>105</sup> Technological

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ASS’N STANDING COMMITTEE ON PROFESSIONALISM, REPORT ON SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS 46–47 (2006) [hereinafter PROFESSIONALISM REPORT], *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool\\_ProfSurvey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool_ProfSurvey.authcheckdam.pdf).

99. PROFESSIONALISM REPORT, *supra* note 98, at 46–47.

100. *Id.* at 45, 52.

101. DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 161 (2005). Only 62% of those responding to the ABA survey reported the availability of on-site supervision. PROFESSIONALISM REPORT, *supra* note 98, at 46–47.

102. RONIT DINOVTZER ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 81 (2004).

103. Deborah Rhode, *Forward* to AALS COMMISSION ON PRO BONO AND PUB. SERV. OPPORTUNITIES, LEARNING TO SERVE vii, vii (1999).

104. AM. BAR ASS’N PRESIDENTIAL INITIATIVE COMM’N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION (2010) [hereinafter DIVERSITY]; Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1–2 (2010) (summarizing research); Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1342 n.126 (2008); Celestial S.D. Cassman & Lisa R. Pruitt, *Towards a Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1248 (2005) (describing survey finding that Asian American law students reported the lowest level of class participation of any group surveyed).

105. See Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 509 (2007); Adam Neufeld, *Costs of an Outdated Pedagogy: Study of Gender at Harvard Law School*, 13 J. GENDER, SOC. POL’Y, & LAW 511, 516–17, 530–39, 554–59 (2005); Sari Bashi & Mariana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.

innovations have created new opportunities for sexual harassment and widened its audience. One well-publicized case in point involved the posting of lewd and derisive statements about female students on AutoAdmit, a law school message board.<sup>106</sup> So too, women and minorities continue to be underrepresented among full-time professors and in positions of greatest status and reward.<sup>107</sup> If, as bar leaders repeatedly insist, the profession is truly committed to values of diversity and inclusion, that commitment should be better reflected in legal education.<sup>108</sup>

A final problem with law school culture is its tendency to reinforce narrow views of professional fulfillment, and to privilege objective measures of achievement at the expense of intrinsic measures of self-worth.<sup>109</sup> This normative climate contributes to a decline in student mental health and disproportionate levels of substance abuse, stress, depression, and other disorders.<sup>110</sup> It is estimated that as many as 40% of law students experience significant levels of psychological distress.<sup>111</sup> Yet only one school has developed a comprehensive preventive approach to such problems, and many other schools have compounded the difficulties by reinforcing intense

L. & FEMINISM 389, 404–13, 423–37 (2006).

106. See Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST, Mar. 7, 2007, at A1.

107. AM. BAR ASS'N, LAW SCHOOL STAFF BY GENDER AND ETHNICITY (Mar. 6, 2012), available at [http://www.americanbar.org/content/dam/abab/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/law\\_school\\_staff\\_gender\\_ethnicity\\_checkdam.pdf](http://www.americanbar.org/content/dam/abab/administrative/legal_education_and_admissions_to_the_bar/statistics/law_school_staff_gender_ethnicity_checkdam.pdf) (minorities represent 13% of tenured professors and 17% of law school deans); Vikram David Amar & Kevin R. Johns, *Why U.S. News and World Report Should Include a Faculty Diversity Index in Its Ranking of Law Schools*, FINDLAW (Apr. 9, 2010), <http://writ.news.findlaw.com/amar/20100409.html>; INST. FOR INCLUSION IN THE LEGAL PROFESSION, IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION (2011), available at [http://www.theiilp.com/resources/Documents/IILP2011\\_Review\\_final.pdf](http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf); Ann McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99 (2009); 2008–2009 AALS Statistical Report on Law Faculty, ASS'N OF AM. LAW SCH., <http://www.aals.org/statistics/2009dlt/titles.html> (last visited Oct. 10, 2012) (women represent 30% of full professors and 20% of law school deans).

108. For bar commitments, see generally DIVERSITY, *supra* note 104; *Statement on Diversity, Equal Opportunity and Affirmative Action*, ASS'N AM. L. SCH., [http://www.aals.org/about\\_handbook\\_sgp\\_div.php](http://www.aals.org/about_handbook_sgp_div.php) (last visited Oct. 10, 2012).

109. Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCH. 883, 884 (2007) (noting the shift from intrinsic to extrinsic motivations among law students due in part to controlling rather than supportive climate).

110. *Id.*

111. Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH, POL'Y, L., & ETHICS 357, 359, 411–12 (2009); Andrew Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 LAW & SOC. INQUIRY 225, 236 (1986).

competition and neglecting the need for student support programs.<sup>112</sup> Anxieties associated with rising levels of debt and unemployment are bringing additional urgency to these concerns.<sup>113</sup> As one third-year student put it, “I don’t know anybody who is not nervous. . . . Frankly, if you’re not nervous, you haven’t been paying attention.”<sup>114</sup>

## VI. STRATEGIES

“Nothing short of everything will really do.”

—Aldous Huxley<sup>115</sup>

Almost thirty years ago, the *New York Times* ran a Sunday magazine feature on “The Trouble With America’s Law Schools.”<sup>116</sup> The piece highlighted many of the curricular concerns common today, particularly the lack of practical training, the inattention to issues of professional responsibility and identity, and the disengagement of upper-level law students.<sup>117</sup> Underlying these problems was a sense of inertia and complacency among the faculty.<sup>118</sup> As one Stanford professor put it, “The present structure is very congenial to us. . . . We’re not indifferent to the fact that our students are bored, but that to one side, law school works pretty well for us.”<sup>119</sup>

Such attitudes remain common. And with reason; for most faculty, the pay, hours, and job security of their positions are enviable.<sup>120</sup> A fundamental problem in American legal education is a lack of consensus among its most influential members that there *is* a fundamental problem, or one that they have a responsibility to address. Legal education has a long and unbecoming history of resistance to reform.<sup>121</sup> That is likely to change only

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112. Peterson & Peterson, *supra* note 111, at 374–75; Sheldon & Krieger, *supra* note 109, at 884.

113. See Karen Sloan, *The View from 3L*, NAT’L L.J., Jan. 26, 2009, at 1.

114. *Id.* (quoting Eric Reed).

115. ALDOUS HUXLEY, *ISLAND* 163 (1962).

116. David Margolick, *The Trouble With America’s Law Schools*, N.Y. TIMES., May 22, 1983, <http://www.nytimes.com/1983/05/22/magazine/the-trouble-with-america-s-law-schools.html>.

117. *Id.*

118. *Id.*

119. *Id.* (quoting William Cohen).

120. TAMAHANA, *supra* note 2, at 47, 51 (2012) (citing data indicating that law professors earn the second highest salaries of academics, and that the majority are in the upper quartile of lawyer earnings); Rapoport, *supra* note 70, at 366.

121. See Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339 (2007); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007); Erwin Chemerinsky, *Legal Education Must Change, But Will It?*, NAT’L L.J. L. SCH. REV. (Nov. 1, 2011, 11:21 AM), <http://legaltimes.typepad.com/lawschoolreview/2011/11/your-best-friend-calls-you-and-tells-you-heshes-really-sick-how-you-show-you-care.html>; see also Richard A. Matasar, *Defining*

if external pressure from students, accreditors, funders, and the market demands it. In the hope of encouraging such pressure, the following discussion identifies some plausible directions for reform.

From the perspective of many faculty and students, the financial difficulties of law graduates call for redistributive solutions. Expanding loan forgiveness, increasing public subsidies, and liberalizing bankruptcy rules to allow discharge of student debts would alleviate many problems. But the obstacles to those responses are substantial. Lawyers are not a group much beloved by American taxpayers, and their elected representatives are likely to resist having government take on additional burdens to aid the profession. In any event, given the current oversupply of lawyers, it may make more sense to curtail rather than enhance the availability of easy credit. Less controversial reforms, such as increasing disclosure about job placement and salaries, are already underway.<sup>122</sup> How much they will affect student application trends and borrowing patterns remains to be seen. It is likely, however, that many schools will feel pressure to control costs, to increase need-based financial aid, and to diversify their revenue streams.<sup>123</sup> Fee-generating programs for non-lawyers, practicing attorneys, and foreign graduate students are obvious options.<sup>124</sup>

Cutting costs would become far easier if the influence of the *U.S. News and World Report* ranking system was challenged and accreditation requirements were significantly curtailed. Law schools could work together with other bar organizations to create an evaluation structure that did not use expenditures as a proxy for quality, and that valued other matters affecting the educational experience, such as diversity and the availability of skills training. Instead of imposing the same requirements on all schools, accreditation authorities could take account of different institutional missions and priorities. Uniform standards for matters such as facilities, adjunct teaching, and faculty research support could be eliminated.<sup>125</sup> Schools could offer a variety of degree options, and states could license graduates of one- or two-year programs to offer routine legal services. Schools could become more affordable by admitting talented students after

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*Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 71 (2008) (noting that the curriculum remains focused not on what students want to learn but on what teachers want to teach).

122. See *supra* note 47 and accompanying text.

123. TAMAHANA, *supra* note 2, at 171.

124. Matasar, *supra* note 84, at 20, 26.

125. For a similar proposal, see TAMAHANA, *supra* note 2, at 173.

three years of college.<sup>126</sup> Institutions could vary in the specialties they offered, in their reliance on adjuncts and online courses, and in the relative importance they attached to practical skills and legal scholarship. Providing students more options might reduce the regressive aspects of the current structure, in which they incur crushing debts to subsidize the research and light teaching loads of relatively well-off faculty.<sup>127</sup>

Given the increased innovation and competition available under such a system, there is no empirical basis for believing that these changes would significantly impair the competence of graduates.<sup>128</sup> Rather, as Richard Posner argues, opening the legal academy to greater rivalry among different models is likely to produce a better educational experience.<sup>129</sup> Law schools would face greater pressure to demonstrate, not simply assert, their cost-effectiveness. Some schools might fail, which would help bring the number of graduates into closer alignment with the number of jobs available for entry-level candidates. So too, the availability of shorter, less expensive training with a practical focus could increase the number of providers for low- and middle-income consumers now priced out of the market for legal assistance.

Fundamental changes in the structure of law schools could prompt similarly fundamental changes in their curricula. Rather than taking the existing core courses for granted, educators should consider what skills are necessary for competent legal practice, and then adjust requirements accordingly. Models for such a skills approach are readily available.<sup>130</sup> One such model is available from Northwestern Law School, which undertook its own analysis of “foundational core competencies” desired by employers, and then developed a two-year program stressing skills in project management, teamwork, communication, leadership, and quantitative analysis.<sup>131</sup> New Hampshire has begun granting licenses to students who

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126. TAMAHANA, *supra* note 2, at 173; Matasar, *supra* note 14, at 1618.

127. TAMAHANA, *supra* note 2, at 39–70, 107–44.

128. See Richard Posner, *Let Employers Insist If Three Years of Law School Is Necessary*, S.F. DAILY J., Dec. 15, 1999, <http://www.dailyjournal.com/subscriber/SubMain.cfm?shCenFileName> (noting the lack of empirical or theoretical explanation for why three years of legal education is necessary); Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001) (exploring challenges to the necessity of the third year of law school).

129. Posner, *supra* note 128.

130. The ABA’s MacCrate report identified critical skills. AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT (1992). More recently Marjorie Shultz and Sheldon Zedeck conducted empirical research into practice skills that was designed to improve admission criteria but that could also guide curricular reform. MARJORIE M. SCHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (2008), available at <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

131. The program requires five semesters and the same tuition as the three-year program, and admits only students with at least two years of post undergraduate work experience. See *Accelerated*

are certified “client ready” after taking a two-year practice-oriented program in the state’s only law school.<sup>132</sup> Participants take courses in negotiation, counseling, and trial and pretrial advocacy, along with a clinic or externship, and electives in areas such as evidence, tax, and business associations.<sup>133</sup> Other schools have implemented a third year experiential curriculum, or capstone courses that aim to bridge the transition into practice.<sup>134</sup> More schools are beginning to share courses through local partnerships or virtual collaborative efforts.<sup>135</sup> Yet despite the enormous effort that has gone into designing these initiatives, systematic evaluations of their effectiveness are unavailable. Such assessment should be a priority for any institution committed to curricular innovation.

There is, however, a considerable body of research on teaching ethical analysis that can guide reform.<sup>136</sup> It points to the value of experiential, interactive, and problem-oriented approaches.<sup>137</sup> Clinics are an especially effective way of teaching legal ethics; engagement tends to be greatest when students are dealing with real people facing real problems.<sup>138</sup> Ethical

JD, NORTHWESTERN L., <http://www.law.northwestern.edu/academics/ajd/> (last visited Oct. 10, 2012).

132. Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 506, 510–12 (2011).

133. *Id.* at 508–10.

134. Maulik Shah, *The Legal Education Bubble: How Law Schools Should Respond to Changes in the Legal Market*, 23 GEO. J. LEGAL ETHICS 843, 857 (2010) (describing Washington & Lee’s third year experiential curriculum); Lee, *supra* note 76, at B5 (describing Washington & Lee’s case-based simulations run by practicing lawyers).

135. One of the most ambitious examples is the “Law Without Walls” course, pioneered by the University of Miami School of Law, that involves students from over a dozen institutions here and abroad. See LAW WITHOUT WALLS, [www.lawwithoutwalls.org](http://www.lawwithoutwalls.org) (last visited Oct. 24, 2012).

136. SULLIVAN ET AL., *supra* note 86, at 135; Stephen Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995); Jane Harris Aiken, *Striving to Teach Justice, Fairness and Morality*, 4 CLINICAL L. REV. 1, 23–25 (1998); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 81 (1996); Russell Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. L. REV. 719, 734 (1998).

137. See *supra* note 136.

138. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 39 (1995); Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 692–96 (1996); Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 (2003); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 QUINNIPIAC L. REV. 643, 694–95 (2004); Joan L. O’Sullivan et al., *Ethical Decision making and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109 (1996). For examples see Richard Acello, *Street Smarts: Law Schools Explore Benefits of Teaching Ethics in a Clinical Setting*, A.B.A. J., June 2011, at 26.

judgment in such settings demands more than knowledge of relevant rules and principles; it also demands a capacity to understand how those rules apply and which principles are most important in concrete settings.<sup>139</sup> When clinics involve clients from disadvantaged backgrounds, students can gain cross-cultural competence and an understanding of what passes for justice among the have-nots.<sup>140</sup> Although clinical courses necessarily address ethical issues that arise during the semester, not all clinicians will have the time, interest, or expertise to provide comprehensive coverage of professional responsibility. Linking a separate course to the clinic, or building in additional hours may be necessary to ensure such coverage. Regardless of the approach chosen for the core professional responsibility course, it should not be the only site for sustained ethical analysis. Students are much more likely to take professional obligations seriously if the entire faculty does so as well.<sup>141</sup> Every law school should provide incentives and accountability for the integration of ethical issues across the curriculum.

Schools should assume similar responsibility for supporting pro bono service.<sup>142</sup> Such work can offer a wide range of practical skills, as well as exposure to the urgency of unmet legal needs. For these reasons, the AALS Commission recommended that schools make available for every law student at least one well-supervised pro bono opportunity and either require student participation or find ways of encouraging the great majority of students to volunteer.<sup>143</sup> Schools should also do more to encourage and showcase public service by faculty. As research on altruism makes clear, individuals learn more by example than by exhortation.<sup>144</sup> If law schools want to inspire a commitment to pro bono work among future practitioners, then professors need to lead the way.

They also need to do more to create cultures in which inclusiveness is valued in practice as well as principle. Every law school should have a formal structure that assigns responsibility for diversity issues.<sup>145</sup> “That responsibility should include gathering information about the experience of” students and faculty and the diversity-related policies that affect them.<sup>146</sup>

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139. Luban & Millemann, *supra* note 138, at 39.

140. Aiken, *supra* note 136, at 24–27.

141. See Joy, *supra* note 138, at 36.

142. See RHODE, *supra* note 101, at vii.

143. *Id.*

144. For the importance of role models, see RHODE, *supra* note 109, at 63. For the importance of law school faculty acting as models, see David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58 (1999).

145. Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 487 (2003).

146. *Id.* For discussion of other changes see DIVERSITY, *supra* note 104; ASS’N AM. L. SCH., *supra* note 108.

Workshops or teaching initiatives that assist faculty in creating more inclusive classroom climates should be priorities.<sup>147</sup>

All of these curricular reform efforts need to address the sources of faculty resistance. They also should provide rewards for those who integrate ethical issues, supply sufficient feedback, and use interactive learning models that have been shown to be most effective. Annual reports, peer assessments, and student evaluations could be used to hold faculty accountable for the quality of the educational experience, which too often now is valued more in theory than in practice.

Most institutions would also benefit from strategies designed to help students cope with the stress and competition of law school life. Efforts along these lines are beginning at a number of institutions, informed by research on positive psychology.<sup>148</sup> More innovation and evaluation is needed. Given that a third of lawyers suffer from mental health or substance abuse problems, legal educators can ill-afford to ignore the dysfunctions that begin in law school.<sup>149</sup>

This is not a modest agenda. Nor is it a context in which anything “short of everything will really do.”<sup>150</sup> The cost, design, and reward structure of contemporary legal education may work reasonably well for faculty, but it falls seriously short in meeting the needs of students and society. The recent chorus of “crisis” rhetoric should remind us of our obligation to do better.

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147. Rhode, *supra* note 145, at 488.

148. Peterson & Peterson, *supra* note 111, 408–15.

149. See sources cited in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 1003 (5th ed., 2009). Attorneys have about three times the rate of depression and twice the rate of substance abuse of Americans generally. *Id.*

150. HUXLEY, *supra* note 115, at 163.



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